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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 4.

KRAUSS BROS. LUMBER COMPANY, a corporation, *Petitioner*,

vs.

DIMON STEAMSHIP CORPORATION, a corporation, Claimant of the steamship "Pacific Cedar," her engines, etc., *Respondent*.

PETITIONER'S REPLY BRIEF.

INTRODUCTION.

Upon request by this Court made during oral argument, this brief is hastily prepared in reply to contentions suggested in respondent's brief and in answer to questions propounded by the members of this Court.

(1)

Jurisdiction in Personam.

By respondent's brief, upon the merits of the question as to the existence of a maritime lien upon the facts presented in this case, and by oral argument, respondent has sought to divert attention to the question of jurisdiction in personam.

The Circuit Court of Appeals for the Ninth Circuit determined that admiralty did have jurisdiction in personam of this cause (R. 65-72; 86). No cross petition for writ of certiorari was filed by respondent. The question may not properly be reviewed now.

However, to remove the possibility of any lurking doubt of the correctness of the ruling in personam, in addition to numerous cases already cited to this Court upon the lien question which indirectly but forcibly support admiralty jurisdiction in personam, petitioner here lists for ready access the authorities submitted to the Appellate Court upon that point:

Matson Navigation Co. v. U. S., 284 U. S. 352, 76 L. Ed. 336;
Morewood Et al. v. Enequist, 64 U. S. 491, 16 L. Ed. 516;
U. S. v. Freights (Mt. Shasta) 274 U. S. 466, 71 L. Ed. 1156;
Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109, 68 L. Ed. 582;
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The Fifeshire, 11 Fed. 743;
Coast Wrecking Co. v. Phoenix Insurance Co., 7 Fed. 236;
De Lovio v. Boit, Fed. Cas. 3776.

(2)

Ship Pledged to Performance of Contract—Not Bill of Lading.

The maritime contract in this case, operating to fix the rights and obligations between cargo owner and ship owner and also (after loading) between cargo and ship, was the original booking contract of affreightment pleaded as an exhibit to the libel (R. 3-12).

The libel alleges "that under the provisions of and in accordance with the aforementioned booking contract, Exhibit A," the respondent vessel loaded and carried petitioner's lumber cargo (R. 5).

The exception interposed against the libel was in the nature of a demurrer as to the existence of a maritime lien under which all allegations of fact are deemed admitted for the purpose of determining the legal question raised. Re-

spondent has not denied the allegation. Hence it is binding upon this Court, which may not properly speculate as to whether a bill of lading was issued, or as to the terms thereof, if issued.

However, for the sake of consideration, let it be assumed that a bill of lading was issued. In that situation still the booking contract of affreightment naming the S. S. Pacific Cedar as the carrying vessel, signed by petitioner as shipper, and by respondent as ship owner, continues unaltered; and the bill of lading serves only as a receipt for the cargo, subservient and subordinate in all other respects to the original agreement, at least to the extent of its express provisions, because the bill of lading was never negotiated to any third party (as evidenced by the fact that the litigants in this cause are the same parties who executed the initial contract).

In this connection, by respondent on oral argument, it was suggested that any such possible bill of lading, of necessity would have named the tentative rate of $10.00. This suggestion shows the extreme hazard of speculation beyond the record, since by actual practice in commerce by water where the shipper is not intending to sell or has not sold the cargo in advance of transportation, or when the shipper has hired all or most of the ship's space, it is common that bills of lading recite "freight as agreed", or like phrases. When a charter party or formal contract of affreightment has been signed, it is only where the shipper is selling the cargo and intends to negotiate the bill of lading through some bank to facilitate collection of the purchase price that any necessity arises for specification of the freight in the bill of lading.

Furthermore, the particular contract in this case provides:

> "This confirmation of engagement when signed becomes a binding contract which cannot be altered or cancelled except by mutual consent in writing." (R. 12, 13.)

Practically never is the bill of lading signed by the shipper. And it is almost preposterous to suppose that the parties would agree to a contingent determination of the rate and amount of freight by a contract which contemplated that immediately upon the issuance of the bill of lading the agreement would be vitiated and the contingent element eliminated.

Hence, petitioner submits the ship, having loaded the cargo under the contract as alleged, became pledged to the performance of all obligations therein, despite possible subsequent issuance of a bill of lading.

(3)

Freight "Rate to be Applied"—Not Rebate to be Returned—Is the Provision of the Contract.

Respondent has repeatedly argued this case on the theory of rebate. The theory is a misinterpretation of the language and the intention of the contract.

The contract of affreightment said:

> "Rate of freight, $10.00 per M ft. Net measurement. * * * In event regular intercoastal carrier moves similar cargo at lower rate, *such lower rate to be applied.*" (R. 9.)

This phrasing is not even suggestive of rebate. It is mere evidence that the carrier, doing business in a highly competitive market, as an inducement had agreed to give the shipper the benefit of a rate lower than $10.00, if similar cargo was moved by a regular intercoastal competitor.

The soundness of petitioner's contention in this regard is demonstrated by asking the question: When did the lower rate become applicable—upon movement of similar cargo by a regular intercoastal carrier at a lower rate, or only after actual payment of the full $10.00 rate of freight by the shipper to the ship owner on delivery of cargo? It is obvious the lower rate was applicable as soon as move-

ment of similar cargo by a regular intercoastal carrier was definitely and actually initiated.

Again petitioner is sustained in its position by the observation that circumstance only has resulted in even the bare appearance of a rebate—the circumstance that the applicable rate was not demanded and accepted at the time cargo was discharged, resulting in the necessity of suit for repayment of the excess.

The contractual clause relative to the freight rate has no more semblance to a rebate than the frequent clause requiring that freight shall be paid at discharge in the monetary medium of the foreign port of destination at the rate of exchange there quoted on the date of loading. Such a clause and variations thereof are commonly employed for the purpose of fixing the manner and amount of final settlement for freight.

Illustrating resort to provision of this character, and declaring the maritime quality of the agreement when contained in an affreightment contract, is the case of *Keyser v. Blue Star S. S. Co.*, 91 Fed. 267, 271 (1899—C. C. A. 5); 81 Fed. 507, 509 (1897—D. C. Fla.), approved by *Pillsbury Flour Mills Co. v. Interlake S. S. Co.*, 40 Fed. (2d) 439 (1930—C. C. A. 2).

Hence, petitioner submits the rebate objection urged by respondent is fallacious.

(4)

Freight Payment Coercive—Not Voluntary.

Respondent inaccurately has asserted that the payment of freight at the tentative higher rate was voluntary. But this claim cannot be urged in the face of the allegations contained in petitioner's libel when the same are read in the light of principles of maritime law affording the ship owner a lien upon cargo.

In this connection the libel alleges as follows:

"* * * which lumber was carried by said respondent steamship 'Pacific Cedar' to the Atlantic Coast of the United States and discharged at the ports of *New York, Philadelphia and Baltimore, between the first and twentieth days of March, 1930; and that between the first and twentieth days of March, 1930, at New York City, New York, the respondent Dimon Steamship Corporation, and the respondents S. S. 'Pacific Cedar', demanded, received and collected from libelant* the sum of $14,657.30, the freight on the aforementioned shipment at the rate of $10.00 per M ft." (R. 5, 6.)

In a subsequent paragraph the libel also alleged:

"that the agreed freight upon libelant's shipment on the respondent steamship 'Pacific Cedar', at the rate of $8.50 per M ft., which was the rate charged by said regular intercoastal carrier on similar cargo, amounted to $12,458.71, instead of the $14,657.30 *demanded and collected by respondents* from libelant for the freight on said shipment." (R. 6.)

From the language of the libel it appears that the lumber cargo was discharged at the three ports of New York, Philadelphia and Baltimore, in the order stated. From the same language it appears that freight payment was made in New York. From the same language it appears that within the period from the first to the twentieth of March, the discharge at all three ports was started and completed. From the same language it appears that within the same period the freight payment was made. From the same language it appears that the freight payment was made at the first port of discharge. Also from the same language it appears that the tentative higher rate was "DEMANDED" and "COLLECTED" by "the respondent Dimon Steamship Corporation and the respondent S. S. Pacific Cedar".

Fair and reasonable construction of the allegations quoted (as against an exception in the nature of a demurrer intended, not to test fine nicety of pleading, but merely to

raise the broad issue as to the cargo owner's right to a maritime lien), certainly forces the conclusion that such allegations sufficiently disclose the coercive element inherent in payment of freight by a shipper to a carrier in possession of the cargo. The allegations quoted alleged the ultimate facts. Had the allegations gone further, stating expressly that the freight payment was involuntary, the libel would have entered the field of conclusions. The pleading involved in this case is a libel in admiralty, where the practice recognizes liberality of pleading as acceptable—the pleading here is not a criminal charge of felony.

Although unnecessary to retreat to any such defensive position upon the point under discussion, it is a sound contention that the coercive or involuntary character of the freight payment is not an essential element of maritime lien in this particular case, since the basis thereof is not a tort, is not a statutory requirement, is not an implied obligation, but on the contrary, is an express contractual undertaking. Affirmatively stated, unless the payment of the tentative higher rate was made by the shipper after delivery of the cargo, and in full present knowledge of the facts and with intention to waive its rights, the lien would not be lost because of the express agreement determining the ultimate amount of freight.

To illustrate, suppose while the ship was en route, the freight had been prepaid at the full tentative rate, not as ultimate and final settlement, but as the mere advance to finance the completion of the voyage, such prepayment being made in ignorance of whether a lesser rate might become applicable under the contingent clause, it could not be concluded that the lien of the shipper would have been lost, for the admiralty decisions contain many approvals of such a lien.

However, petitioner reiterates that upon the allegations of the libel in this case its freight payment was actually not voluntary.

(5)

Lien Based Upon the Fact of a Lower Applicable Rate—Not Upon Knowledge Thereof.

By respondent it has been urged the libel fails to show sufficient facts to create a lien because containing no allegation that the ship owner, at the time of accepting payment of the full amount of freight on the higher tentative rate, knew of the movement of similar cargo by a regular intercoastal carrier at a lower rate and the resultant applicability of such lower rate.

But the gist of petitioner's libel is not a tort or a crime—merely a breach of an affreightment contract. This contract makes a certain fact, not knowledge thereof, the basis for the applicability of the lesser freight rate. To violate a contract of carriage, it is not requisite that a ship owner be acting feloniously or fraudulently; to breach a contract mere omission or oversight may be more than sufficient. In fact without exemptive clauses a carrier by water is an insurer, except as to an act of God.

Suppose that a shipper were asserting in court a claim based upon cargo damage, when was it ever considered necessary to allege or prove as an element of the lien against the ship that the carrier had intentionally caused the damage or had actual knowledge thereof? The basis for recognition of such a lien is the mere fact of damage (in the absence of express exemption), since the affreightment contract, for the performance of which the ship was pledged upon loading of cargo, was breached by such damage.

Carriers by water for many years have resorted to almost uniform practice of inserting in bills of lading clauses requiring that shippers within very limited periods of time serve written notice of claims for damage to or loss of cargo and for failure or delay in delivery thereof, as disclosed by innumerable decisions construing such clauses. Why have ship owners required the protection of such limitations? Because of frequent actual lack of knowledge of

the fact of damage, loss, shortage, or delay occurring with the continued ignorance of the carrier.

If knowledge of the cause or fact of damage to cargo were an element in the maritime lien against the ship, then an owner of lumber cargo could recover for breakage because apparent, but an owner of some expensive chemical requiring a constant degree of temperature for preservation, could not recover if the automatic refrigerating system or some special heating equipment temporarily failed to function, because the cause of damage was unknown and the fact of damage hidden by air-tight metal containers. Certainly no such discriminatory result has been permitted by the maritime law heretofore, and should not be permitted hereafter by the creation of any distinction between the cargo owner's rights in the assertion of a lien for undisclosed cargo damage and in the assertion of a lien for retention of unearned freight.

Hence petitioner repeats that the ship and cargo having been mutually hypothecated for the performance of the contract by loading of cargo thereunder, the ship became subject to the lien by the fact that the owner or master received freight money in excess of the agreed sum unaffected by the then knowledge or ignorance of the owner or master as to the correctness of the amount at that time. For similarity of facts see *The Oceano*, 148 Fed. 131 (D. C. N. Y. 1906).

(6)

Ship Guilty of Breach of Contract.

Respondent has claimed that the facts alleged by petitioner's libel were insufficient to support the maritime lien because not adequately disclosing fault or breach in the af-freightment obligation of the ship.

Like a corporation, a ship cannot default in its obligations or infringe upon the rights of another except through an act of commission or omission on the part of some indi-

vidual person. It is only by legal fiction that a corporation or a ship is ever held responsible for performance of any duty.

Under the maritime law, speaking in the abstract, what must a cargo owner show to establish a fault or breach by a ship resultant in a lien? Only these facts: (1) The existence of a contract of affreightment made for the ship by some authorized person whether owner, charterer, master or agent; (2) The loading under that contract of the contemplated cargo aboard such ship; (3) Non-performance of some maritime obligation under that contract by such owner, charterer, master or agent. The fact of union of ship and cargo for the purpose of carriage results in the mutual hypothecation of ship and cargo as a pledge to secure each to the other due performance.

Sufficient in this regard was alleged by the libel (R. 4, 5, 6), which said:

(1) That respondent Dimon Steamship Corporation owned and operated steamship "Pacific Cedar" as a cargo carrier;

(2) That petitioner entered into booking contract with the respondent Dimon Steamship Corporation (copy being attached as Exhibit A) under the terms of which space was engaged on the respondent steamship "Pacific Cedar" for loading on or about January 17, 1930, at certain named ports and for shipment to certain named ports of approximately a specified amount of lumber, which contract contained the agreement as to freight which constitutes the gist of this litigation;

(3) That "under the provisions of and in accordance with" such contract, the contemplated cargo was "loaded upon respondent steamship 'Pacific Cedar'" and carried thereby to ports of destination;

(4) That contemporaneous with the discharge of said cargo "the respondent Dimon Steamship Corporation and the respondent steamship "Pacific Cedar" *"DEMANDED,*

received and *COLLECTED*" from petitioner the freight at the tentative higher rate of $10.00;

(5) That the agreed applicable rate of freight was a lesser sum "instead of the $14,657.30 *demanded and collected by respondents*";

(6) That before commencement of suit, petitioner had "demanded from *respondents*" repayment of the difference between the sum actually paid and the sum rightly retainable; and that "*respondents* had wholly failed, refused and neglected to repay".

Petitioner submits that the admiralty practice requires only that the allegations of a libel for such a cause of action in rem show the actual facts, to wit, that the freight in excess of the amount earned and agreed was demanded and collected by the ship owner and not repaid by it, since, resulting from the contract and the loading of cargo thereunder, the breach of the contract is imputed to the ship as a matter of law. However, petitioner's libel not only alleged the actual facts, but it also alleged the legal facts.

Petitioner suggests that if the libel here fails to allege facts sufficient to constitute a maritime lien against the ship for return of freight money, all the decisions allowing and enforcing such a lien (heretofore cited by the briefs of petitioner in this cause) must be disapproved and overruled by this Court.

(7)

Lower Freight Rate of "Regular Intercoastal Carrier" Not Extraneous.

Brief of respondent on the merits of the question presented says the lower rate of the Luckenback Steamship Company "is unrelated to the performance of any obligation of carriage by the vessel" (p. 5). It is difficult to conclude that this notion is advanced seriously. A mere reading of the contract shows that respondent joined with peti-

tioner by means of the clause fixing the applicable rate and the amount of freight in an agreement which results in the impossibility of determining whether the contract has been performed or breached without resort to proof that there was a "lower rate to be applied" (R. 9). If the lower rate clause is extraneous in the contract here, petitioner echoes the language of the Court's opinion in *Keyser v. Blue Star S. S. Co.*, 91 Fed. 267 (C. C. A. 5), when dealing with a charter party clause, identified as No. 7, requiring "sufficient cash for ship's disbursements at port of loading to be advanced the master by charterers or their agents, at current rate of exchange", etc.

Dispute arising as to the applicable rate of exchange, the Court said:

> "Such being the case, it may very well be that the libelant would have refused to charter the ship except upon the condition that the charterer would make and agree to observe stipulation 7 as expressed in the charter party. It is true that the mere fact of this agreement being embraced in the charter party would not, of itself, give it the character of a maritime contract; but its relations to the other stipulations of the charter party may be such (and we think appears to be such) as to connect it with the contract into which the parties were entering—a contract of undisputed maritime character—and in such a manner as to authorize the parties to apply to a court of admiralty to inquire into any alleged breaches of this stipulation 7. *Insurance Co. v. Dunham*, 11 Wall. 1-36; *Ben. Adm.*, Sec. 257-262, 287, and cases there cited."
>
> *Keyser v. Blue Star S. S. Co.*, 91 Fed. 267, 271.

Freight being one of the three absolute essentials to every maritime affreightment (the very name is eloquent), petitioner submits the lower rate clause is not a mere "hangnail" to be trimmed off painlessly, but the heart essential to the life of the contract.

(8)

"Visible Occurrence" Present in this Case.

Respondent's brief has admitted that it can find no case asserting a maritime lien directly contra to petitioner's contentions. The brief says that "no decision of this Court or other courts has dealt with this precise question" (p. 5). It is true search in this litigation has not uncovered any decision involving similar facts where the lien has been denied; but petitioner's previous briefs make citation of and quotation from a number of well-considered opinions based on facts not distinguishable in principle where the lien has been upheld.

However, in distress for lack of other support, respondent resorts to the opinion of this Court in *O. S. K. vs. Pacific Export Lumber Co.*, 260 U. S. 490, 67 L. Ed. 364, and quotation therein from *The S. L. Watson*, 118 Fed. 945, to the effect that no lien arises "except in connection with some visible occurrence relating to the vessel or cargo".

As already observed, both these cases involved an assertion of a lien relative to cargo never loaded and for which the vessel had never been hypothecated. Hence the language of this Court's opinion must be read in the light of that fact.

As to the case of *O. S. K. v. Pacific Export Lumber Co., supra*, what "visible occurrence" was lacking? Merely the loading of the cargo left on the dock when the vessel sailed.

Possibly in tort cases the requirement of some "visible occurrence" results in the necessity of the damage being visible. Even in the field of tort, petitioner suggests the test may not be literally and strictly sound or reliable. Apply the test to this set of facts: A passenger aboard a vessel enters a compartment fumigated by invisible gas. The compartment should have been kept locked or should have been carefully aired. Inhaling the gas, the passenger's lungs, stomach or other vital organs are temporarily or permanently injured with no resulting symptoms of pain

except purely subjective. Could the maritime law of the land be construed to deprive the passenger of his lien against the ship merely because the damage was invisible?

Doubtless the maritime lien in the hypothetical case, the facts being proven, would be taken for granted as to the legal right without submission of doubt to any court. But if analysis of the illustrative case were made, the lien would probably be reconciled to the test of "visible occurrence" by reverting to the act of fumigation of the ship's compartment.

And this conclusion brings the discussion back to a consideration of maritime liens arising from breach of contract. What is the "occurrence" that must be "visible"? Petitioner submits that in affreightment cases the occurrence need not be the damage of which complaint is made, for considering cases supporting a lien for concealed damage to cargo, it is apparent that the antecedent loading of cargo resulting in mutual hypothecation of ship and cargo is the only requirement of this test.

Referring to both *O. S. K. v. Pacific Export Lumber Co., supra,* and *The S. L. Watson, supra* (in both of which the cargo was not loaded), it is said that the maritime lien is secret and must not be extended in principle beyond accepted limits, to the detriment of creditors and purchasers of the ship. Petitioner is relying upon long-adopted and long-established principles, but has experienced difficulty in this litigation merely from the novelty of the facts.

However, all maritime liens against vessels are secret in the sense that the law requires neither possession of the ship in the hands of the cargo owner nor recorded notice on file in any public office. And the lien asserted in this cause was never more deeply hidden and secreted from prospective creditors or purchasers of the ship than some other lien for concealed cargo damage, or for unjust port-of-call expenses, or for return of an excess sum paid for freight in calculating the rate of exchange, or for repay-

ment of a portion of freight returnable because of error in figuring port-of-loading advances made by the shipper. And all of the instances recited, together with many more of equal argumentative value, are history extracted from cases cited by petitioner's former briefs, and are not merely hypothetical, drawn from imagination.

In short, a lien asserted by petitioner is in no degree more secret or more hidden than the ordinary affreightment lien except where circumstances result in obvious damage to cargo. But of what actual practical benefit to prospective creditors or purchasers of the ship could the apparent quality of the cargo damage serve? Prospective creditors or purchasers can not rush from one port to another port tracing the derelictions of an ocean-going steamship by inspecting the docks and wharves for leaking oil drums or broken bath tubs. To criticize the maritime lien in this case as secret is to criticize all maritime liens. This quality of the maritime lien is doubtless a valid reason for limiting its extension in principle, but it is no just basis for refusal to apply the adopted and recognized principle to a contract novel only in its method of fixing the rate of freight.

(9)

Hypothecated Relationship Between Cargo and Ship Not Terminated Until Contract Fully Performed.

Respondent, in its brief and upon oral argument, has contended that the maritime lien asserted by petitioner was non-existent, because the same arose after completion of performance by the ship of its maritime obligations under the contract. This argument has successfully confused the District Court and the Appellate Court, but it should not mislead this Court. The contention is based solely upon a misunderstanding and misinterpretation as to the time when and how the lien claimed by petitioner arose.

In the first place, although the respondent ship did physi-

cally load, carry and discharge petitioner's cargo as contemplated by the affreightment contract, such physical service was not due performance of the ship's obligations under the contract, since the entire service was performed not in consideration of the agreed freight at the applicable rate, but was performed in consideration of an excessive freight, wrongfully demanded and wrongfully retained. In other words, it cannot justly be said that the respondent ship has made right delivery and has become entitled to exoneration from its pledge to the cargo resultant from loading under the affreightment contract.

And now discussion reaches the query as to the point of time when and as to the facts by which the maritime lien asserted by petitioner was born.

Examination of the authorities dealing with analogous liens in contract make it safe to declare that the lien did not arise only upon the actual demand and payment of excess unearned freight. In contemplation of law, the petitioner's right as cargo owner against the vessel arose upon the initiation of movement of similar cargo by a regular intercoastal carrier at a lower rate. The libel alleges that this movement occurred "in the month of January, 1930" (R. 6). It was in the same month that the libel alleges cargo was loaded by petitioner upon the respondent ship (R. 5).

The fallacy of respondent's argument in this connection has resulted from its failure to distinguish between the time when petitioner's damage as cargo owner was sustained and the time when its right to the maritime lien accrued. Once this distinction has been brought to light, authorities cited by respondent to this Court dealing with violations of affreightment contracts by a ship owner to the detriment of the cargo owner prior to the loading of cargo and prior to the mutual hypothecation of ship and cargo, become of no weight or consequence as an analogy in considering the present case for the purpose of determining whether a

maritime lien may wholly arise and develop into enforcibility after due performance and right delivery of cargo.

CONCLUSION.

In conclusion, petitioner invites the Court's attention to revert back to the opinion of *Dupont Etc. Co. v. Vance*, 60 U. S. 162, 168, 169, 15 L. Ed. 584, 586, where this Court said that "the maxim that the ship is bound to the merchandise and the merchandise to the ship for the performance of the *obligations created by the contract of affreightment*, is a settled rule of our maritime law"; and also to consider this case in the light of the grant of maritime and admiralty jurisdiction by the several States to the United States and this Court, which grant must have been intended not to minimize but to preserve the maritime and admiralty jurisprudence of this country, of which the maritime lien is the special feature.

Respectfully submitted,

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EXPLANATORY NOTE.

Because of the brevity of time allowed by the Court's order for the preparation of this reply brief and collection of decisions dealing with the several points discussed, including liens based on concealed cargo damage, and because this brief has been prepared by petitioner's proctor under emergency circumstances, with the usual memoranda and facilities unavailable, it has been impossible to supplement citations previously made except by the few listed below, some of which have been received from the office of petitioner's proctor by telegram, the A. M. C. reports not being at hand.

Supplemental Citations.

Northern Pacific Railway Co. vs. American Trading Co., 195 U. S. 439, 49 L. Ed. 269, 280;
The Artic Bird, 109 Fed. 167, 170;
The Eldorado, 1923 A. M. C. 430;
The North Cliffe, 1923 A. M. C. 933;
Mar Mediterraneo, 1924 A. M. C. 1067.